IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 860 of 2005

WITH

CIVIL APPLICATION NO. 2025 of 2005

Vinod Amrutlal Shah & Anr. .. Appellants

versus

The State of Maharashtra & ors. .. Respondents

APPEAL FROM ORDER NO. 861 of 2005

WITH

CIVIL APPLICATION NO. 2133 of 2005

Virendra Bhagwandas Shah & Anr. .. Appellants

versus

The State of Maharashtra & ors. .. Respondents

Mr.Surel S. Shah for the appellants.

Mrs.Geeta Mulekar, AGP for the respondent no.1.

Mr.S.G. Surana for the respondent no.2.

A N D

APPEAL FROM ORDER NO. 862 of 2005

WITH

CIVIL APPLICATION NO. 1021 of 2005

Vidya Vinay Vivek Co-operative
Housing Society Ltd. .. Appellants

versus

The State of Maharashtra & ors. .. Respondents

...

Mr.P.S.Dani i/b M/s.Mulla & Mulla for the petitioner.
Mrs.Geeta Mulekar AGP for respondent no.1.
Mr.S.G. Surana for the respondent no.2.

CORAM : B.H. MARLAPALLE,J

DATED : 14th September 2005.

P.C: -

1. These appeals arises from a common order

dated 16th August 2005 passed by the Learned Judge of the City Civil Court whereby Notice of Motion nos. 2132, 2133 and 1685 of 2005 filed in S.C. Suit No. 2025, 2026 and 1997 of 2005 respectively came to be dismissed. The appellants are the plaintiffs in the three suits.

2. By the order dated 23rd August 1990 passed by the Addl. Collector, Mumbai Suburban District land admeasuring about 832.3 sq.m. from the plot bearing CTS No. 982/1 and 982/4 came to be allotted in favour of respondent no.2 -Co-operative Society for the construction of a multi storeyed building for its 20 members as per the list annexed thereto, on depositing a sum of Rs.2,54,232.90 calculated @ Rs.450/- per sq.m. This allotment order came to be challenged by the plaintiffs in S.C. Suit no.8966, 8967 and 8968 of 1990. These suits came to be dismissed on 12th January 2005 by separate judgements and therefore, the plaintiffs approached this Court in First Appeal Stamp nos.9224, 9477 and 9480 of 2005 which came to be dismissed in limine on 15th April 2005 as not maintainable. The relevant portion of the said order reads as under:-

> " After reading the Plaints in all these matters, it is absolutely clear that the instant suits are filed under section 6 of the Specific Relief Act and, therefore, the suits are not maintainable. The view expressed by the trial court in that behalf is correct. Needless to say that even the first appeals are also not maintainable and, hence, all these first appeals will have to be rejected and are rejected as such.
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> . However, it will be open to the appellants to adopt such other available remedy if they are so advised to get the question of title adjudicated upon. It is clarified that this court has not expressed any opinion either way on the question of title of the appellant and, if the appellants adopt any other remedy the court seized of the matters shall deal with it independently and in accordance with law. It is also clarified that if the appellants file any proceedings to establish their title, the findings on title given in the impugned judgement in the instant suits which are not maintainable, would not come in their way and the court seized of such proceedings should deal with them independently in accordance with law."

3. Consequently, the plaintiffs approached the City Civil Court in the fresh round for getting their title to the suit property adjudicated afresh, by filing S.C. Suit nos.2025, 2026 and 1997 of 2005. While dismissing the Notice of Motions in all these three fresh suits, the trial Court set out the

reasoning that the suits were hit by res-judicata, in view of the judgement and decree dated 12th January 2005 and the First Appeals against the said decree having been dismissed by this Court. The trial Court also noted that prima facie the fresh suits were not maintainable. As per the trial court, it was necessary for the plaintiffs to prove their title to the suit property independently and claim repossession so as to ask for the appointment of the Court Receiver. On the prayer for temporary injunction, the trial Court noted that in the decree passed on 12th January 2005, it was held that the plaintiffs were not in possession of the suit property and therefore, the said prayer did not survive.

4. The learned counsel for the plaintiffs referred to the order passed by this Court on 15th April 2005 dismissing the First Appeals in limine and submitted that they were granted liberty to re-approach the trial Court for getting their title over the suit property adjudicated independently and in accordance with law. This Court also clarified that if the plaintiffs filed any proceedings to establish their title, the findings on title given in

the impugned judgement in the appeals would not come in their way and the Court seized of such proceedings, should deal with them independently in accordance with law. The learned counsel for the plaintiff urged that the view taken by the trial Court in rejecting the Notices of Motion is in disregard to the clarifications set out by this Court in its order dated 15th April 2005.

5. The prayers in the Notices of Motion dismissed by the impugned orders read as under:-

> (a) that pending the hearing and final disposal of the present suit this Honourable Court may be pleased to appoint Court Receiver High Court, Mumbai, as a Receiver of the suit land under Order 40 Rule 1 of the Code of Civil Procedure and be further pleased to appoint the plaintiffs as agents of Court Receiver with further directions to the Court Receiver to put the Plaintiffs in possession as was in use prior to dispossession i.e. 5th September 1990, till disposal of the suit.
>
> (b) that pending the hearing and final disposal of the suit the Defendants their servants, agents, representatives and/or assignees etc. be restrained by an Order of injunction from entering upon the suit property more particularly known

as Gowan Part of land situated being rear portion of the land bearing Survey No.185, Pot Nos.1 and 2 Part, now bearing CTS No.982, admeasuring 112 sq.yds, situate at Vile Parle(W), Pakhadi Pond, S.V. Road, Mumbai 400 056, more particularly described in the survey plan annexed as Exhibit "C" to the plaint, and disturbing the peaceful possession of the Plaintiff upon the suit property.

6. There is no dispute that the plaintiffs in the first two appeals are claiming their title over the suit land as owners in as much as they claim that their predecessor Mr.Bhatia was the owner of the suit land which came to be transferred to them whereas the plaintiffs in the third appeal claim the title by adverse possession. The suit properties in these three appeals are as under:-

Appeal No.860/05 Plot nos.1 and 2 of CTS No.982 admeasuring 112 sq.yards.

Appeal No.861/05 Plot nos.1 and 2 of CTS No.982 admesuring 125.5 sq.m.

Appeal No.862/05 Plot Nos.1 and 2(Part) now bearing CTS no.982, 982/1 and 982/4 .

7. In the judgements dated 12th January 2005, the trial Court while deciding the earlier suits has recorded its findings against the plaintiffs on the following issues.

> (6) Do the plaintiffs prove their title to the suit property?
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> (7) Do the plaintiffs further prove that they were perfected of the title to the suit property by adverse possession?
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> (8) Do the plaintiffs further prove that they are the tenants of the defendant no.1 in respect of the suit land as alleged?
>
> (11) Do the plaintiffs further prove that the first defendant had illegally allotted the suit land and it is bad in law?

The trial Court has assessed the evidence as placed on record and set out its reasoning on these issues as under :-

> **Issue nos. 6 to 8.**
>
> "From the record which has been produced, referred hereinabove, in the form of P.R.

Card, enquiry register, it is obvious that title in respect of suit land had already remain to the state (Defendant No.1). The Plaintiff had correspondent with Defendant no.1, wherein Plaintiff just before 3 years of suit sought to purchase the property and had offered to this effect to the Government. In view of this admitted position, it will not suit to the plaintiff to claim ownership by adverse possession. The very application made by the Plaintiff to the Government for allotment of land and communication in this behalf destroys the plaintiff's case of adverse possession. Las is well settled, possession should be conscious to the owner, to the knowledge of true owner. The plaintiff has to plead and prove overt act on the basis of which it could have been inferred or ascertained that from a particular point of time his possession become hostile and notorious to the exclusion of State. There is absolutely no pleading to show as to when openly Plaintiff sought to enjoy the so called possession, hostile to the true owner, Government (defendant no.1). It was claimed that F.S.I. of this property was enjoyed by predecessor of Plaintiff. If it is so, such user of F.S.I. on Government land is illegal and this act being in between predecessor-in-title of Plaintiff and Municipal authorities. It could not have been construed to the knowledge of true owner, the Government and consequently utilisation of F.S.I. will not amount to stake claim as and by way of adverse possession. It is curious, in the city survey record at Exhibit-31 name of Mohandas Tulsidas Bhatia is shown as lessee. However, except this entry at Exhibit-31, there is no other document to substantiate that there was valid lease from Defendant No.1 in favour of said Mohandas Bhatia. Even if there was such lease, it could not have been extended to the benefits of plaintiff who claims to be purchaser of adjoining property. Thus, said Bhatia or Plaintiff even on the bases of this lease are not entitled to claim adverse possession. In the enquiry register at Col.13 (Exhibit-19), name of said Bhatia appears. However, making of such entry in enquiry register will not

take away right of Government as owner To repeat, there is absolutely no evidence that possession of either Plaintiff or their predecessor in-title ever became adverse to the knowledge of original owner, Government Defendant No.1. The nature of possession of said Bhatia at the most would be continued to be of lessee than as true or owner by adverse possession and there is no document to substantiate that there was any valid lease in favour of either predecessor-in-title or of said Bhatia. The Plaintiff also claimed right in the property on the basis of tenancy. The correspondence effected in 1987 in unequivocal term accepted ownership of Defendant no.1. Therefore, the claim of tenancy will not survive. There is no documents to show existence of tenancy in favour of the Plaintiff or their predecessor-in-title. The entry in property register card can never be treated to be documents of title or document contemplating delivery of possession. Thus, mere entry in property register card will not support theory of possession as Plaintiffs have approached Defendant No.1 for allotment of suit land or grant thereof. It is pertinent that in the revenue record (Form No.6) as on 21.6.1960, Gowan land at the rear of survey No.185-4 was recorded to be not so done. Consequently, it was shown as Government barren land, pursuant to order of Addl. Collector bearing No. IMDSR/IV-94 dated 28.5.1960. The detail discussion answers issue no.6, 7, 8 against the Plaintiff.

Issue No.11.

. It was claimed that first Defendant has illegally allotted suit land and it is bad-in-law. However, on analysis of papers I do not agree to this situation. By order dated 3.7.1990 considering the letter of Collector dated 12.4.1990 the Government of Maharashtra through Revenue and Forest Department allotted the area to the extent of 832.3 sq.mts from O.T.S.No.992/1, 982/4 to the Society-Defendant No.2 and its 20 members names are incorporated, having approved by the

> Government on 3.7.1990. The allotment letter was on the basis of valuation dated 1.2.1976 at the rate of Rs.450/- per sq.mt and consequently amount of Rs.2,54,000/- as price of said property was collected from defendant no.2. The Government being owner of the property, was entitled in law to allot the land to hutment dwellers, since they were in its use for considerable long duration. The act of Government can not be challenged unless malafides and total illegality is pleaded by quoting such instances. Possession of suit property is handed over vide possession receipt in favour of Defendant No.2 by the Circle Inspector. Such possession receipt as indicated earlier is brought on record in cross-examination at Exhibit-39. In the light of Government Resolution, it cannot be said that there is any illegality on the part of the State in allotment of suit land to Defendant No.2, housing society. It is pertinent that Plaintiffs themselves were interested in getting allotment of suit land as emerged in their correspondence. The plaintiff did not succeed in getting such allotment and now are crying of illegality against Defendant No.1 of Defendant no.2. Hence, issue no.11 is answered against Plaintiff.

8. These findings cannot be set aside or disregarded for deciding the prima facie case for granting injunction for appointment of the Court Commissioner at the instance of the plaintiffs, more so because the first appeals have been dismissed in limine which could indicate that the said findings have not been set aside. Undoubtedly, while deciding the fresh suits for adjudicating the title of the plaintiffs over the suit land, these findings may not

come in the way of the plaintiffs so long as they are able to adduce independent evidence in support of their case. Though it was not permissible for the trial Court to opine in the impugned order that the fresh suits were not maintainable, it would not be safe to discard the findings on the above issues in the old suits while considering the fresh motions for temporary injunction. The plaintiffs may fail even in the fresh round of litigation but pursuant to the order passed by this Court dated 15th April 2005, they had the option to approach the trial court afresh. Notwithstanding this unwarranted observations of the trial court, the impugned order dismissing the Notices of Motion cannot be faulted with. More so because there is no prima facie case made out by the plaintiffs regarding their possession over the suit property and this could be more explicitly gathered from the following circumstances.

9. The learned counsel for the respondent no.2 has placed on record a certified copy of the sketch in respect of the government land bearing CTS No.982 and 981/1 to 4 Vile Parle (West). The sketch indicates that there were some encroachments on Part 2, Part 3 and Part 4 of CTS no.982. The respondent

no.2 has been allotted a plot admeasuring 832.3 sq.m from CTS 982/1 and 982/4 whereas CTS 982/2 admeasures 19.5 sq.m. On 24th July 1963, the Mamledar, South, Salsette, Andheri had addressed a letter to Mr.Dharamdas Raghunathji, the predecessor in title of Mr.Bhatia pointing out that he had encroached upon a plot of land admeasuring 161 sq.yards from Survey No.185 which is now re-numbered as CTS no.982. Similarly, on 29th December 1988, the appellant in Appeal No.862 of 2005 was issued a letter by the Addl. Collector, Mumbai Suburban District pointing out that it had encroached upon CTS No.9892/2 admeasuring 19.5 sq.m. The other plaintiffs were also issued such letters which prima facie indicates that the plaintiffs were encroachers on the plot of land which they have termed as suit properties. So far as the allotment order dated 23.8.1990 in favour of respondent no.2 is concerned, it has reached its finality and the findings recorded by the trial Court on that issue in its judgement dated 12th January 2005 cannot be upset or impeached by the plaintiffs at this stage (Issue No.11)

10. Thus, the assessment of the documents on record shows that the plaintiffs have no prima facie case in their favour to obtain an order of temporary

injunction or an order for appointment of the Court Receiver. More so when the allotment in favour of the respondent no.2 has received its finality and the suit land appears to be a land of the State Government. These appeals therefore fail and the same are hereby dismissed in limine.

11. Mr.Dani makes an oral application for stay. Application is rejected.

B.H. MARLAPALLE, J